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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS KELLY CUEVAS,

Defendant and Appellant.

F071956

(Super. Ct. No. F14908275)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Jane Cardoza, Judge.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Poochigian, Acting P.J., Detjen, J. and Franson, J.

INTRODUCTION

Appellant Jose Luis Kelly Cuevas (defendant) was convicted of three counts of violating Penal Code¹ section 288.7, subdivision (a), sexual intercourse or sodomy with a child under 10 years of age; and two counts of violating section 288.7, subdivision (b), oral copulation or sexual penetration of a child under 10 years of age. Cuevas appealed. Appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

Defendant was charged with three counts of violating section 288.7, subdivision (a), sexual intercourse or sodomy with a child under 10 years of age (counts 1, 2, & 3); and two counts of violating section 288.7, subdivision (b), oral copulation or sexual penetration of a child under 10 years of age (counts 4 & 5). Trial commenced on May 12, 2015.

Defendant's daughter, N., was eight years old when she testified at trial.² N. testified that defendant "put his private in mine." She was referring to her "back private," which she uses to "do the restroom." N. testified defendant had done this about seven times, beginning when she was five years old.

N. testified defendant "usually always does that when he's drunk" and fights with her mother. N. testified that it "feels hard" and "hurts" when defendant did this to her, but she did not scream although she was scared. When defendant was done, he would tell N. to "never tell anybody."

N. testified that defendant "put his private one time in my front private." On another occasion, defendant put his fingers inside her "front private" and she could feel

¹ References to code sections are to the Penal Code.

² Certain persons are identified by initials in accordance with our Supreme Court's policy regarding protective nondisclosure. No disrespect is intended.

him “scratching.” This stung and hurt. Defendant also made N. “suck” his “front private” when he was drunk; it “felt nasty” and made N. feel like she was going to choke.

N. never told her mother what was happening because she was scared her mother would not want to live with her anymore and would run away. N. told her sister and later her three cousins.

The three cousins told their mother, R.R., who became aware of the incidents in 2014 about a year prior to the trial. R.R. recorded a conversation with N., which was played at trial and a transcript provided. In the tape, N. stated defendant would come to her room and do “something nasty” to her; that defendant makes her “suck his thing” and “he licks his fingers and puts it in her front butt.” N. described some of the incidents in detail. While defendant was engaged in these acts against N., he would be watching pornography, which ended up on N.’s iPod.

N. did not want defendant to live with her anymore. N. also told her aunt that defendant told her not to tell anyone or he would hit her with his belt. R.R. described N. as appearing “real scared” that defendant would find out she had told someone about the abuse and he would hit her with the belt.

R.R. told her mother, N.’s grandmother, about what N. stated defendant had done to her. The day after this taped conversation, they took N. to the hospital.

M.R., N.’s mother, testified that when she and defendant fought, she would not allow him to sleep in their bedroom. M.R. and defendant both worked, but not always the same shift and there were times defendant was alone with N. M.R. first became aware of what was happening between defendant and N. when her sister, R.R., told her.

Tonya Franklin, a hospital social worker, interviewed N. After completing her interview with N., which lasted about 30 minutes, Franklin contacted the Firebaugh Police Department and a medical doctor at the hospital.

Firebaugh Police Officer Brett Miller went to the hospital to interview N. Once Miller determined N. knew the difference between a lie and the truth, he proceeded to

interview her. N. provided details to Miller of the time, place, and ways in which defendant had touched her inappropriately.

Miller and another officer then interviewed defendant. Defendant initially denied ever getting kicked out of the bedroom he shared with M.R., then later admitted this happened. When he was not sleeping in the same room as M.R., defendant would sleep in N.'s bed, but denied ever touching N. inappropriately.

Jaylene Osen, a nurse practitioner at the hospital, conducted a physical examination of N. N.'s anus and hymen appeared normal. Osen testified she could not determine medically one way or the other whether sexual abuse had taken place. Osen also interviewed N. N. told Osen that defendant put his "privates" in her "behind," mouth, and "front part of privates."

Christina Valencia, another social worker at the hospital, spoke with N. N. told Valencia that "her father had put his privates in her privates."

Firebaugh Police Officer Magda Martinez arranged for an "MDIC interview" of N. The recorded interview was played for the jury and a transcript of the interview included as an exhibit. N. told the interviewer that defendant put his "private" in her "behind" more than five times and would watch "nasty videos" on his phone while he did so; put his finger in her "front private"; put his "private" in her "front butt"; and forced her to lick and suck on "his private."

David Love, a licensed therapist, testified as an expert on Child Sexual Abuse Accommodation Syndrome. Love testified to each of the five components of the syndrome: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicting, unconvincing disclosure; and (5) retraction.

On May 26, 2015, the jury returned verdicts finding defendant guilty on all five counts. On July 13, 2015, defendant was sentenced to an indeterminate term of 25 years to life on count 1; consecutive terms of 25 years to life on counts 2 and 3; and

consecutive terms of 15 years to life on counts 4 and 5; for a total aggregate term of 105 years to life.

Defendant filed a timely notice of appeal on July 13, 2015.

DISCUSSION

Appellate counsel filed a brief pursuant to *People v. Wende, supra*, 25 Cal.3d 436 on February 17, 2016. That same day, this court issued a letter to defendant inviting him to submit a supplemental brief. Defendant's supplemental brief was filed on March 16, 2016. Defendant asserts in his letter brief that he was never given the opportunity to testify and defense counsel rendered ineffective assistance.

A defendant has a right to testify at his or her own trial over the objection of defense counsel. (*People v. Allen* (2008) 44 Cal.4th 843, 860.) Nowhere in the record, however, does it appear that defendant asserted this right. In fact, after defense counsel rested, the trial court specifically informed defendant that he had a right to testify on his own behalf and asked defendant if he wished to testify. Defendant responded, "No." The trial court asked if defendant had made this decision not to testify freely and voluntarily; defendant responded, "Yes." The trial court then asked if defendant had any questions about his right to testify; defendant responded, "No." Defendant's assertion that he was prevented from testifying in his own behalf is not supported by the record and is without merit.

As for defendant's claim that defense counsel "never did anything" for him and rendered ineffective assistance, again, the record fails to disclose evidence of ineffective assistance. Defense counsel vigorously cross-examined witnesses; challenged proposed jury instructions; and delivered a thorough closing argument. The proper way to raise ineffective assistance of counsel is by way of a petition for writ of habeas corpus, not in a direct appeal. (*People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9.) When the record does not disclose deficient performance by defense counsel, the conviction is affirmed. (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

After an independent review of the record, we find that no reasonably arguable factual or legal issues exist.

DISPOSITION

The judgment is affirmed.